EVENING POST JOB PRINTING OFFICE, NEW YORK.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1906.

EDWARD S. THOMAS, ASHBEL P. FITCH, Jr., and LLOYD M. HOWELL, Trustees in Bankruptcy of Jacob Berry & Company,

Petitioners,

vs.

ANNA D. TAGGART, HARRIS FILSON, GEORGE DONALDSON, WILLIAM C. BOWERS and GEORGE E. HALL,

Respondents.

Petition for writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit.

BRIEF FOR RESPONDENTS.

I.—THE QUESTION OF LAW INVOLVED IN RICHARDSON v. SHAW, ON WHICH THE AUTHORITIES ARE IN CONFLICT, IS NOT INVOLVED IN THIS CASE.

Interpretation of *written* contracts under which respondents deposited stocks with Jacob Berry &

Co. as *security* for marginal dealings is the only question decided by the Circuit Court of Appeals or presented in this case. This appears affirmatively from the petition, which states that the printed receipts accepted by respondents stated "the conditions upon which Jacob Berry & Co. received the stock" (fols. 14, 25). An entirely different question—what contract arises *by operation of law* as to stocks *purchased* by a broker for his customer on marginal account—was involved in Richardson *v.* Shaw, recently brought to this Court by writ of *certiorari*, and in the conflicting decisions of the New York and Massachusetts courts represented by Markham *v.* Jaudon, 41 N. Y., 235, and Covell *v.* Loud, 135 Mass., 41.

In deciding this case the Circuit Court of Appeals did not rely upon Richardson *v.* Shaw, but further distinguished it, saying:

> "The claimants of the pledged stock in this case are not seeking to follow into the hands of the Trustees in Bankruptcy the proceeds of stock purchased for them by the brokers, but are seeking the proceeds of stocks which they had deposited with the brokers upon opening an account or in the course of dealings for speculative purposes."

All the stocks involved in this case were *deposited* with Jacob Berry & Co. *as collateral* for marginal transactions under *written contracts*. There is no conflict of law upon the relation of broker and customer as to such deposits, or as to the rule of interpretation of written contracts.

The conflict between the New York and Massachusetts State Courts, the former "holding that where a broker *buys stock on a margin* the title is in the customer for whom he buys; the other that it is in the broker," involved in Richardson *v.* Shaw, 147 Fed., 659, 662, is not presented in this record. The Massachusetts rule has not been extended to

stock *deposited as collateral* for speculative account. All the Massachusetts cases, and *In re Swift,* 112 Fed., 315, speak of and involve only stock *purchased by the broker* on speculative account.

There is clear distinction between stock *bought on margin* and stock *deposited as collateral* on marginal account. In one case the question is whether title passes to customer in stock purchased by a broker, not intended for delivery to customer, and to be paid for and carried by broker almost entirely with his own funds; in the other, whether title passes from customer to broker in stock deposited for the sole purpose of protecting latter against loss because of customer's trading, and which can be transferred by broker only upon approximate exhaustion of margin. Illustrated by Willard *v.* White, 56 Hun, 581, and Sillcocks *v.* Gillaudet, 66 Hun, 522, holding that stock deposited as collateral for speculative dealings with broker, and by broker pledged to secure a general loan to himself, had equity superior to stock bought on margin, and pledged on same loan.

Other questions presented in Richardson *v.* Shaw are not involved here:

(1) Whether money paid by a broker the day before he makes a general assignment, broker and customer knowing broker's insolvency, to reduce customer's margin, is a preference within the bankruptcy act.

(2) Whether *lex loci* or *lex fori* shall control.

The present case was held by the Circuit Court of Appeals, and is conceded by petitioner's counsel (Petition, fol. 25) to depend not upon the adoption or ejection of the New York rule that the law, *in absence of express agreement,* implies a certain contract between broker and customer as to stock bought on margin, *but upon interpretation*

of express contracts under which the stocks involved were deposited.

The Referee, District Judge and three Judges of the Circuit Court of Appeals, decided unanimously for respondents.

II.—THE CONTRACTS BETWEEN BERRY AND COMPANY AND RESPONDENTS SHOW INTENT TO PLEDGE THE STOCK, NOT TO TRANSFER IT IN LIEU OF CASH NOR TO PASS TITLE TO BERRY AND COMPANY.

Establishing that the understanding of parties was that the stocks were delivered as collateral only, negativing intent to pass title as well as the claim they were delivered in lieu of cash, are the facts that across the face of Taggart receipt were written in ink "Collateral on Account" so as to partly obliterate and cancel the printed matter (fol. 389); Bower's receipt recites only that the certificate is "deposited as collateral and to be used in taking up any stock purchased" (fol. 410); Hall's receipt stated only "Held as collateral" (fol. 459); and in the case of Donaldson it is stipulated it was understood the certificate was "deposited as collateral security" (fol. 422). Conversations with some of respondents at time of delivering the stock show this was the understanding of parties (fols. 299-305, 421). In statements rendered by Berry & Co. to customers, the stock is set down as "long" and "coll"—collateral (fol. 378).

Filson deposited his stock, receiving a receipt substantially like the one set out in petition, for the special purpose of releasing certain Pennsylvania stock which the broker was supposed to be carrying for him. Instead of applying the stock to such purpose, the broker used it as collateral for a loan for his own use, and the next day failed. Filson never received his Pennsylvania stock and no

Pennsylvania stock was found among the assets of the bankrupts, or as collateral for any loan (fols. 127 and 128).

Pre-eminent in all the contracts is the fact that the stock was deposited as collateral security—as a pledge. Any doubtful words in the contracts should be construed to confer power consistent with this main representation of broker to customers, and not, as petitioners contend, to nullify it. If special powers were conferred it was done to enable broker more readily to indemnify himself against loss on customer's account, and not with intent to pass title. The conditions upon which such powers could be exercised never arose. These customers always had ample margin; it never became necessary for broker to pledge or sell these stocks to protect himself in dealings of these customers, but the pledge to the Hanover Bank was made to raise money for use of broker or customers other than respondents.

Analysing receipt set forth in the petition (original of which contained no italics):

1. Nowhere is it stated the stock is received in lieu of cash; but it is described as a "deposit * * * as security." When money is delivered as margin, it pays and extinguishes the indebtedness *pro tanto,* and correspondingly increases the margin; but money, in such a case, is very different from stock. Money pays a debt; stock simply secures it. If the stock was given broker in lieu of cash, it must have been accepted as the equivalent of a certain sum of money, and this sum of money should have been credited to the customer. How much money? And where is it shown broker credited respondents with any such payment? Stock cannot be both deposited as collateral and transferred as a payment: if the former, customers retain title, subject to fulfilment of conditions; if the latter, title vests in broker with absolute right of disposition. That

these stocks were deposited as *collateral security* cannot be questioned, and was admitted again and again by petitioners, in argument in the courts below; they now wish that fact to be lost sight of in order to create the erroneous impression that the stock was delivered as part payment of the stocks to be purchased on margin.

2. "General Deposit" does not show intent to pass title. "Deposit" indicates the contrary. The distinction made was between a general and a special deposit. In either case, however, the title remains in the depositor. If he can identify his own property, he is entitled to it. If it is so mingled with other similar property that he cannot identify it, then he becomes a tenant in common in the mass with the owners of the other property.

3. "May *hold* the same as *margin* and as *security*" conclusively show intent that customer retains title. "Margin" adds nothing to "Security." Margin is simply the excess of value of securities held by the broker over amount of customer's indebtedness.

4. Authority to "apply the deposit in part payment or on account of *losses* on any or all transactions," &c., for customer's account, shows the stock was pledged, not sold. There was no right to apply the deposit except in case of *loss* by customer. Such language cannot be reconciled with petitioner's contention that the stock was intended to be applied as payment at time of deposit.

5. Broker had no power to repledge the deposited certificates or to substitute similar certificates (Petition, fol. 27). "It will be observed that the contract contains two distinct provisions. One re-

lating to the deposited stock and the other relating to the stocks, securities, etc., which the brokers are to purchase or sell for the client. It is the latter alone that the broker 'may repledge, rehypothecate or loan' when held by them as margin or otherwise." (Opinion of Circuit Court of Appeals.)

6. As petitioners rely principally upon these rights alleged to have been conferred upon brokers as to deposited stock, we will assume, but for the sake of argument only, that they were given. Such rights would not weaken respondent's position.

(*a*) Permission to *re*pledge and *re*hypothecate the stock shows original transaction to be a pledge or hypothecation. Trustees claim this authorized Berry & Co. to pledge or hypothecate the stock in order to borrow money to be used for its own purposes, regardless of the condition of customer's account. Such construction is unwarranted. Power to pledge, if given, was only for the purpose of borrowing money necessarily advanced by broker as part of the purchase price of the stocks bought for the same customer, not for borrowing money for other customers or himself. But even such a power as is contended for by trustees is entirely consistent with a pledge. Lawrence *v.* Maxwell, 53 N. Y., 19.

(*b*) "May substitute similar stocks," &c., does not indicate ownership in Berry & Co. The New York courts hold such power is conferred by law as to stocks bought on margin in absence of agreement, and that it does not change the relations of parties as pledgor or pledgee. Caswell *v.* Putnam, 120 N. Y., 153. Stock of the same company, having the same value, although it may be represented by a different certificate, not a *promise* of any kind, must be *simultaneously* substituted.

8. Berry & Co. "may without notice, upon *approximate exhaustion of margins*" sell the stocks. This forbids sale except upon that one condition.

9. If these provisions, when taken together, gave to Berry & Co. *all* the powers which an owner of the stock would have, there might be some ground for the trustees' argument; but they do not. In each case where a special power is given its scope is limited. For instance, the power to apply the deposit is limited to losses on transactions for account of the depositing customer. If Berry & Co. was owner, it could apply the deposit for every purpose. Power to sell without notice is limited both in time and place—only upon approximate exhaustion of margin and at enumerated stock exchanges. If Berry & Co. was owner, it could sell at any time and at any place. The bare fact that these special and peculiar powers were specifically mentioned in the receipt shows parties did not intend Berry & Co. to become the owner. Ownership, of itself, would carry with it every one of these special powers, and many more besides.

III.—RESPONDENTS MUST PREVAIL UNDER THE LAW OF NEW YORK, WHICH IS LEX LOCI AND LEX FORI.

Markham *v.* Jaudon (1869) decides the relation of broker and customer as to stock purchased on margin when no express contract is made to be that of pledgor and pledgee. That ruling has been repeatedly followed.

Content *v.* Banner, 184 N. Y., 121, 124.

Gillette *v.* Whiting, 120 N. Y., 402, 204.

Gruman *v.* Smith, 81 N. Y., 25, 27.

Henton *v.* Jerome, 54 N. Y., 480, 483.
Rothchild *v.* Allen, 90 Ap. D., 233, 235. Aff'd. without opinion, 180 N. Y., 561.

In Content *v.* Banner, decided Feb., 1906, in an opinion concurred in by all the judges, the Court says, p. 124:

> "In this case, although the brokers advanced the whole of the amount necessary to purchase the securities instead of only a percentage thereof (which has come to be commonly known as margin) the relation between them and their customers was that of pledgees and pledgor, as in Markham *v.* Jaudon (41 N. Y., 235), Baker *v.* Drake (66 N. Y., 518), and many other cases in this state based upon speculation stock transactions."

Petitioners' claim that Markham *v.* Jaudon has been overruled or limited upon the only point material to this case, is without foundation.

Butler *v.* Drake overruled Markham *v.* Jaudon only in an *immaterial* part (Petition, fol. 21).

> "The rule for adjusting damages in such case was settled by this Court in Butler *v.* Drake, 53 N. Y., 211, overruling Markham *v.* Jaudon (*supra*) upon the relation of damages, but leaving it *undisturbed in other respects.*"
>
> Gruman *v.* Smith, *supra.*

Courts bound by such a rule in respect to stock bought on margin, obviously would hold the title in stocks deposited under the express contracts with respondents remained in customers.

Lawrence *v.* Maxwell, Willard *v.* White and Sillcocks *v.* Gillaudet, *supra.*

In Ogden *v.* Lathrop, 65 N. Y., 158 (Petition, fol. 30), stock was delivered as security for a note, written authority being given payee of the note to "use, transfer or hypothecate the same at payee's option, payee being required, on payment or tender, at the proper time, of the amount loaned and interest to, return an equal quantity of said security, and not the specific stock deposited." Defendant sold the stock deposited but later returned to plaintiff the same amount of like stock. The Court held the sale was not a conversion. Clearly the decision has no application to the case at bar.

The decision of the Circuit Court of Appeals agrees with the New York authorities and is sound in reason.

It is respectfully submitted that the prayer of the petition should be denied.

October Term, 1906.

THOMAS THACHER,
Of Counsel for Anna D. Taggart.
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Of Counsel for Harris Filson.

Supreme Court of the United States.

EDWARD S. THOMAS, LLOYD M. HOWELL and ASHBEL P. FITCH, Jr., Trustees in Bankruptcy of Jacob Berry and Harold L. Bennett, individually and as Jacob Berry & Company,
Plaintiffs-in-Error,

against

ANNA D. TAGGART *et als.*,
Respondents.

Brief of Plaintiffs in Error. No. 197. October Term, 1907. Ordered to be argued with No. 122.

Upon writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit, granted and filed March 28th, 1907.

Statement of Facts.

Plaintiffs in error are the trustees in bankruptcy of Jacob Berry & Company (*fol. 4*).

Jacob Berry & Company were stock-brokers in New York City. They made a general assignment for the benefit of creditors on the 26th day of November, 1904, and were adjudicated bankrupts on their own petition, a receiver being appointed on November 30th, 1904 (*fol. 30*).

On November 25th, 1904, Berry & Company procured a loan of $45,000 from the Hanover National

Bank, of New York City, giving stock collateral, in which was included stock certificates delivered to Berry & Co. by the respondents to margin speculative accounts. This loan was not paid, and the Bank sold a portion of the collateral to reimburse itself on November 26th, 1904, and subsequently turned over to the trustees in bankruptcy a cash balance and certain certificates of stock (*fols. 31, 32*).

Respondents, customers of Jacob Berry & Company, claimed the returned certificates of stock and the proceeds of the certificates sold.

All claims were referred to a referee in bankruptcy to hear and determine the interests of the various claimants.

The referee found in favor of seven claimants (*fols. 42–61*).

The District Court confirmed the finding of the referee (*fols. 65–66*).

From the decision in favor of five claimants, the present respondents, the trustees in bankruptcy, appealed to the United States Circuit Court for the Second Circuit, and that Court affirmed the decision below (*fols. 167–171*).

In re Berry, 148 Fed. Rep., 176.

A petition for a writ of certiorari was granted by this Court on the 28th day of March, 1907.

Three of the respondents, Mrs. Taggart, Mr. Filson and Mr. Bowers, delivered certificates of stock to margin their accounts, taking from Berry & Company the following receipt:

> "Received from (stating the name of customer and kind of certificate). The same to be a general deposit, and this receipt is given and received with the mutual understanding that Jacob Berry & Co. may hold the same as margin and as security for or apply the deposit in part payment of or on account of losses on any or all transactions in the pur-

chase or sale of stocks, bonds, securities or commodities made by them for your account.

This receipt is given and received upon the further understanding and agreement in consideration of Jacob Berry & Co. executing such orders for the purchase or sale of stocks, bonds, securities or commodities as may be given to them in writing, orally by telegraph or telephone; that the said Jacob Berry & Company may repledge, re-hypothecate or loan any or all of said stocks, bonds, securities or commodities held by them on account thereof as margins or otherwise; may substitute similar stocks, bonds, securities or commodities therefor, and that said Jacob Berry & Co. may without notice, upon the approximate exhaustion of margins, sell or buy, as the case may be, any stocks, bonds, securities or commodities bought or sold or held by them as collateral or margin, or otherwise, as the case may be, without notice, provided, however, that such purchases or sales be made either upon the Consolidated Stock & Petroleum Exchange of New York, the New York Stock Exchange, the Chicago Board of Trade, or in any other Exchange in the City of New York where such stocks, bonds, securities or commodities are dealt in.

(Sgd.) JACOB BERRY & Co."

Mrs. Taggart's receipt had written on its face the words " collateral on account " (*fol. 131*).

Mr. Bowers deposited $150 on the printed receipt and two shares of New York, New Haven & Hartford stock upon a written receipt which stated " deposited as collateral and to be used in taking up any stock purchased, the $150 cash deposit to be included " (*fols. 138–139*).

Mrs. Taggart's original deposit consisted of eighty-three shares of United States Steel Preferred. These certificates were deposited by Berry & Co. as collateral for the $45,000 loan but were not sold by the Hanover National Bank and were returned by the Bank to the trustees (*fol. 124*).

Mr. Filson deposited on the same day that the securities were delivered by the bankrupts to the Bank as a collateral for the loan, ten shares of Atchison Preferred and ten shares of Erie First Preferred (*fol. 82*). He testified that these certificates were delivered to pay in full for forty shares of Pennsylvania, which he desired to have delivered to him (*fols. 85–86*).

These certificates were among those sold by the Bank. It is stipulated that at the sale made by the Bank these certificates brought the sum of $2,070.50 (*fol. 78*).

Mr. Bowers' certificate for two shares of New York, New Haven & Hartford stock was among those sold by the Bank. At the sale it brought in the sum of $283.87 (*fol. 143*).

Mr. Donaldson deposited three shares of United States Steel Preferred, which were deposited with and sold by the Bank bringing the sum of $283.87 (*fols. 142–3*).

Mr. Donaldson was given no receipt, but received a "bought notice" which will be referred to later.

Mr. Hall deposited twenty shares of United States Steel Common and thirty shares of American Ice Company Common. He received a receipt which simply stated "Held as collateral" (*fol. 154*). One of Mr. Hall's certificates for ten shares of United States Steel stock was among the unsold certificates returned by the bank to the trustees (*fols. 50–51*)

The respective claims present important variations which will be discussed in the points.

At the time Jacob Berry & Company placed these securities with the Hanover National Bank as collateral for the loan of $45,000 all of these claimants were indebted to Jacob Berry & Com

pany on account of marginal purchases of stock which had not been paid for in full, yet in each case the account if closed out would show a cash balance or profit due the customer.

The question involved on this appeal is whether the respondents are merely general creditors or are entitled to receive back from the bankrupts' estate the certificates of stock which they deposited as margin or as the Circuit Court of Appeals states it,

> "whether the relation of pledgor and pledgee is created between client and stock broker by a deposit of this character or whether such a deposit is not in effect a release of the client's title to the security to the broker which creates the relation of creditor and debtor."

POINTS.

I.

The Circuit Court of Appeals erred in construing the contract governing Mrs. Taggart's claim.

Mrs. Taggart's account shows that she indulged quite largely in marginal dealings and at any time would have had to pay the brokers a substantial cash sum in order to get delivery of the certificates of stock held for her account (*Exhibits A and B inserted between pages 74 and 75*).

On November 25th, 1904, for instance, she would have been obliged to pay over $10,000 to get delivery of the stock in her account. This account Mrs. Taggart had started with 83 shares of U. S. Steel preferred stock under the printed form of receipt (*fol. 100*).

The Circuit Court of Appeals said:

> "It will be observed that the contract contains two distinct provisions: One relating to the deposited stock, and the other relating to the stocks, securities, etc., which the brokers are to purchase or sell for the client. It is the latter alone that the brokers 'may repledge, rehypothecate or loan, when held by them as margin or otherwise.' As to the deposited stock, they 'may hold the same as margin and as security' for losses on any transaction, or may apply it in part payment of or on account of such losses. If money had been deposited instead of the securities, it would ordinarily have been credited on account to the clients and stood as a margin against losses; and as to any balance in the brokers' hands at any time the clients would have been merely creditors. If the securities had been deposited under a stipulation in the contract that they should stand as a margin for a specific sum, perhaps the same legal consequences would have attended the transaction. But there is nothing in terms, nor as we think by implication, which suggests that the parties contemplated any sale of the deposited stock to the brokers, or any sale or disposition of it by the brokers except in the event of losses of the client, approximately exhausting the marginal requirement."

The first paragraph of the contract reads—

> "Received from Anna D. Taggart, 83 shares U. S. Steel Preferred, No. 2.3563, c. 15546. the same to be a general deposit and this receipt is given and received with mutual understanding that Jacob Berry & Co. may hold the same as margin and as security for or apply the deposit in part payment of or on account of losses on any or all transactions in the purchase or sale of stocks, bonds, securities or commodities made by them for your account."

The Circuit Court of Appeals says that this portion of the contract alone is to be considered as applying to the deposited stock.

On analysis this first paragraph of the agreement provides that the deposited stock shall

(*a*) Be a general deposit ;

(*b*) Be held as margin ;

(*c*) And as security for, or applied in part payment of or on account of losses on any or all transactions, etc.

(*a*) GENERAL DEPOSIT.

The words " general deposit " convey a meaning antagonistic to the idea advanced by the respondents and approved by the Circuit Court of Appeals that deposited securities could only be used by the broker in case of loss or approximate exhaustion of margin. They would rather seem to indicate an intention that the broker should credit the customer's account with the certificates deposited and deal with the certificates according to the customs of the Stock Exchange, which would include the right to pledge these and substitute similar certificates.

Tausig vs. *Hardt, 58 New York, 425 ;*
Lawrence vs. *Maxwell, 53 New York, 19 ;*
Caswell vs. *Putnam, 120 New York, 153.*

The words general deposit are not in accord with the idea of a deposit as collateral security, which is surely a special deposit nor with a special property right or title in the customer, to the certificates themselves.

(*b*) HOLD THE SAME AS MARGIN.

The rule of the Circuit Court of Appeals appears to be that if money had been deposited as margin, it would have been credited on account to the customer, stood as margin against losses and as to any balance in the broker's hands the customers would have been mere creditors. If the securities had been deposited under a stipulation that they should stand as margin for a specific sum, the relation of debtor and creditor would perhaps have existed ; but that in the case of securities simply deposited as margin, the relation of debtor and creditor would not exist.

We find no ground for these distinctions. Money, securities with a stipulated value, and securities with a value not stipulated, are all deposited for the same purpose. The same legal principles should apply in each case. The very idea of a margin is that the customer makes a part payment upon the stock he orders purchased, borrowing from the broker the remainder of the purchase price. This part payment is credited to the customer on account.

Now whether the credit be given on money or securities there is no difference. The intention and purpose is the same.

The distinction between securities stipulated to stand as margin for a specific sum and securities stipulated to stand as margin without a specific sum being mentioned, is particlarly unreal. We can find no substance in it. It can only be based upon the idea that such a credit or margin should be in a specified amount.

If this is the idea it has no support in reason.

If a broker agreed to accept securities as a margin for a stipulated amount he would bind himself to that stipulated amount regardless of the rise or fall in value of the particular security. Such an

agreement would be impracticable because the margin might wholly disappear through the depreciation of the securities and so fail entirely while the broker was by his agreement bound to consider it a part payment of a specific sum.

From the customer's standpoint the appreciation of the security would make the latter's deposit with the broker perhaps greater than the broker required or than the customer needed to carry his speculative account.

On the other hand where securities are deposited as a margin without the amount for which they are accepted being stipulated, the reasonable implication is that they are accepted as a margin up to their value, just as money is accepted. Value may rise or fall; it is determined daily by a large number of transactions and is ascertainable at any moment. The broker is not precluded from requiring additional margin nor is the customer precluded from withdrawing unnecessary margin. An agreement of this character is practical. The deposit is credited to the customer at its value, as in this case.

This is the custom of brokers and it is undoubtedly this exact relation which was intended by the receipt at bar, so that even on the first paragraph of the receipt there is good reason for holding that the broker had other rights in the deposited security than to realize on it in case of loss.

But we urge that the receipt is all one instrument and should be read as a whole without arbitrary severance of the sentences. Read in this way and giving the words of the agreement their natural meaning, the right to re-pledge, re-hypothecate, loan and substitute similar securities, obviously applies to the securities deposited as well as to securities purchased on the customer's order.

The object of giving the receipt was to state the terms upon which the securities deposited were held.

Hence, the provisions of the second paragraph of the receipt would, in the absence of a specific exclusion apply to the securities deposited.

The second paragraph commences

> "This receipt is given and received upon the further understanding and agreement in consideration of Jacob Berry & Company executing such orders for the purchase or sale of stocks, bonds, securities or commodities as may be given to them in writing, orally, by telegraph or telephone; that the said Jacob Berry & Company may re-pledge, re-hypothecate or loan any or all of said stocks, bonds, securities or commodities held by them on account thereof as margin or otherwise; may substitute similar stocks, bonds, securities or commodities therefor, etc."

The words with which the second paragraph starts "This receipt is given and received upon the *further* understanding" are sufficient to show that the deposited securities are included in the second paragraph and there is nothing in the words "said stocks" to exclude the securities deposited. On the contrary, it would be the securities specifically described, rather than those generally referred to, which would appear to be meant by these words. It is only by narrowing the words "said stocks" to stocks purchased, that a contrary meaning can be gathered.

The right to re-pledge, re-hypothecate or loan any or all of said stocks, bonds, securities or commodities is further defined by the words "held by them on account thereof as margin or otherwise."

The securities deposited were held by the brokers on account of the securities purchased as margin. They are thus expressly included in this paragraph of the receipt.

No other securities referred to in the receipt, either specifically or generally, would be held on

account or as margin for the securities purchased, except the securities deposited for margin.

The words are as inclusive as may be—"*any or all of said stocks, bonds, securities or commodities held by them on account thereof as margin or otherwise.*"

The fair construction is that under this first portion of the second paragraph of the receipt all stocks bought upon the customer's order, as well as all stocks deposited on account thereof, as margin, are meant, and as to all of them the broker is given the right to re-pledge, re-hypothecate, loan or substitute similar stocks.

This is further borne out by the remainder of the second paragraph of the receipt which says :

> "and that said Jacob Berry & Company may, without notice, upon the approximate exhaustion of margin, sell or buy, as the case may be, any stocks, bonds, securities, or commodities bought and sold, or held by them as collateral or margin or otherwise, etc."

This clause specifically includes securities held as collateral or as margin as well as securities bought and sold.

Taken as a whole, remembering what it was given for and giving all of the words a fair and natural meaning, it is apparent that the right to re-pledge, re-hypothecate, loan and substitute other securities is conferred, with regard to securities deposited as well as stocks purchased.

This is particularly evident when it is considered that a margin is given to a broker on account of the purchase price. Where the margin consists of money, the broker can pledge the stocks purchased for the balance of the purchase price, but where securities are given as margin the broker has to borrow the entire sum necessary to pay for the pur-

chased stock and can only do it by pledging the securities given as margin as well as the stock purchased. The deposited securities were given to the broker to work with, to start an account, and this conceded purpose is largely determinative of the construction of the contract at bar.

We contend that the powers of disposition expressly given the brokers under the printed contract authorized them to dispose of Mrs. Taggart's stock certificate, either by loaning or pledging ; that they had the further right of substituting similar certificates therefor, and Mrs. Taggart's position was by reason of these facts merely that of a creditor.

The case presented by Mrs. Taggart is that of a sale and agreement to exchange rather than that of a bailment and pledge, and consequently her rights are those of a creditor, not of a pledgor.

> *Sturm* vs. *Boker*, *150 U. S.*, *312*.
> *Laflin* vs. *Burkhardt*, *97 U. S.*, *116*.
> *Norton* vs. *Woodruff*, *7 New York*, *153*.
> *Carpenter* vs. *Griffin*, *9 Paige* (*New York*), *310*.

In *Sturm* vs. *Boker*, *150 U. S.*, *312*, *at page 329*, Mr. Justice JACKSON said :

> " The recognized distinction between bailment and sale is that when the identical article is to be returned in the same or in some altered form the contract is one of bailment and the title to the property is not changed. When on the other hand there is no obligation to return the specific article and the receiver is at liberty to return another thing of value he becomes a debtor to make the return and the title to the property is changed ; the transaction is a sale."

In *Norton* vs. *Woodruff* (*2 N. Y., 153*), GARDNER, *J.*, said:

> "The distinction between the obligation to restore the specific thing received or of returning others of equal value, is the distinction between a bailment and a debt, as recognized by decisions in England and this State, with the exception of *Seymour* vs. *Brown* (*10 Johns., 44*) The decision of *Seymour* vs. *Brown* has been overruled in the same Court in which it was pronounced."

By reason of this express contractual right of wide disposition the case is stipulated out of the New York doctrine that the broker is the pledgee, the customer the pledgor, in stock transactions, as exemplified by *Markham* vs. *Jaudon* (*41 New York, 235*).

Furthermore, *Markham* vs. *Jaudon* (*41 New York, 235*) and the other cases which have followed it down to and including *Leo* vs. *McCormack* (*186 New York, 330*), have concerned themselves with the customer's and broker's relations as to stock purchased for the customer's order. There is every reason in principle why securities deposited as margin should stand on a different basis, being, as they are, a credit on account to the customer and intended to give the broker something to work with in opening an account. These considerations we have previously referred to.

The question as to whether the Massachusetts rule (*In re Swift, 105 Fed. Rep'r., 493; Chase* vs. *Boston, 180 Mass., 455*), or the New York rule (*Markham* vs. *Jaudon, 41 New York, 235*), should be adopted by this Court, has been argued at length in the case of *Richardson* vs. *Shaw*.

We shall not repeat the arguments there urged, except to call attention to the fact that the requirements of business and the customs of business call for a rule which places title in the broker. That

this is particularly true in the case of securities deposited as margin by reason of the nature and purpose of such a deposit is obvious. The rule of law which most closely accords with equal justice to all and with the business practice and understanding of the community is the most desirable.

The relation of debtor and creditor as to securities deposited as margin clearly defines the business practice. To make the relation that of pledgor and pledgee is to work an injustice in instances such as this case presents.

To make the customer a creditor where he margins his account with money, and a pledgor where he margins it with stock certificate is to work a great difference in result where there is no difference in principle. It enables the certificate depositing customer to recoup in a case of bankruptcy at the expense of the money depositing creditor. It is not equality, but the most aggravated inequality.

This single consideration seems of sufficient importance to require this Court to place the two classes of customers upon an equal basis and require them to share in the bankrupt estate as creditors rather than permit the one to take all and the other little or nothing.

The opposite result would occasion a marked injustice based upon no sound distinction in principle.

Mrs. Taggart's claim should therefore be dismissed.

II.

Mr. Bowers' claim should have been dismissed.

In Mr. Bowers' case the cash deposited by him, $150, alone was specified in the printed contract similar to that in Mrs. Taggart's case. An-

other receipt was given at the time, as follows: "Received of W. C. Bowers 2 shares No. 64640 N. Y. N. H. and Hartford Railroad stock deposited as collateral and to be used in taking up any stock purchased, the $150 cash deposit to be included. Signed, Jacob Berry & Co." (*fols. 138-139*).

The words of this second receipt, "to be used in taking up any stock purchased," can only mean that the brokers had the right to apply the deposited stock in part payment of stock purchased. The only stock the broker had to take up was that purchased on the customer's order. The only way in which the broker could use the deposited stock in taking up stock purchased was by applying it in part payment therefor, and it was for use by the broker that the stock was delivered.

The Bowers' case, therefore, shows a contractual right to apply the deposited securities in part payment of any stock purchased. The written receipt alone is decisive of the question whether the debtor and creditor relation existed between the customer and the brokers.

The 2 shares of New York, New Haven & Hartford stock and the $150 cash deposited served to margin the purchase of 50 shares of Ontario & Western stock (*fols. 134, 135*).

On November 25, 1904, the 50 shares of Ontario & Western stock were held by the brokers for Mr. Bowers' account, and no payment had been made thereon except the 2 shares of New York, New Haven & Hartford stock and the $150 (*fol 134*).

On November 25, 1904, the brokers pledged the 2 shares of New York, New Haven & Hartford stock deposited by Mr. Bowers with the Hanover National Bank to secure a loan to them for $45,000 (*fols. 20, 21, 150, 151, 162*). This certificate was returned to the Trustees (*fol. 134*).

This loan was made to the brokers for their own purposes—not for the account of their customers.

If they used Mr. Bowers' stock as their own in securing this loan, they showed by that act that they had exercised their right to apply it to the part payment of purchases made for Mr. Bowers' account.

The very act of pledging it for a loan to themselves was an application of the stock under the Bowers' receipt. From this time on Mr. Bowers was a creditor merely. Title had passed to Berry & Company. It follows that a reversal should be had as to the claim and Mr. Bowers should be relegated to his proper remedy *i. e.*, filing his claim as a creditor.

III.

Mr. Filson's claim should have been dismissed.

Mr. Filson's account shows a series of marginal dealings on both sides of the market in which he at no time had sufficient cash deposited with the brokers to pay for the stocks ordered by him (*fol. 96*). On the morning of November 25th, 1904, Berry & Company were carrying for him on the long side 10 shares of Steel Common, 10 shares of American Car & Foundry, 10 shares of Wabash Common, 40 shares of Pennsylvania; on the short side, 20 shares of Atchison preferred, 10 shares of Erie first preferred, 10 shares of U. S. Steel preferred, 10 shares of Amalgamated Copper, and the account showed a cash balance of $3,105.97.

On November 25th, 1904, he deposited 20 shares of Atchison preferred and 10 shares of Erie first preferred (*fols. 82-83*) in order to pay in full for 40 shares of Pennsylvania stock and have the same delivered and transferred, taking the printed re-receipt (*fols. 76-77*).

These certificates were used to obtain the loan

from the bank by the brokers and were sold by the bank (*fol. 78*).

This express agreement and understanding to which Mr. Filson testified that the steel stock was given to the brokers in payment for the 40 shares of Pennsylvania, is decisive of his case.

He testified :

> "Q. And you delivered those to Jacob Berry & Company to be used as security, as I understand it, for this margin account? A. No, sir. They were to be used for the transfer of these forty shares of Pennsylvania.
>
> Q. Let me again ask you—they were to be used in substitution in that account for those forty shares of Pennsylvania were they not? They were to take the place of the forty shares of Pennsylvania as collateral security for that margin account, isn't that correct? A. The Pennsylvania stock was not security.
>
> Q. Was the Pennsylvania stock purchased outright by you? A. The putting in of those certificates was for the purpose of purchasing those Pennsylvania shares outright.
>
> Q. Stock that you delivered then was to be used as the purchase price of the Pennsylvania stock?
>
> A. Yes, sir.
>
> Q. You had not, up to the 25th day of November, 1904, paid in full for forty shares of Pennsylvania stock, had you? A. No, sir" (*fols. 85, 86*).

When the Atchison and Erie certificates were delivered in payment for the unpaid Pennsylvania stock title to the former passed at once to the brokers. Mr. Filson's right thereafter was with regard to the 40 shares of Pennsylvania stock alone. He could not by any possibility be considered a pledgor of the Atchison and Erie stock. He was simply a creditor, and should file his claim in bankruptcy.

IV.

Mr. Hall's claim should have been dismissed.

Mr. Hall deposited on November 1st, 1904, thirty shares of American Ice Company Common and two certificates for ten shares each of United States Steel Common, with Jacob Berry & Company. It is for one of the certificates for ten shares of United States Steel Common that he now claims (*fol. 149*).

He received a receipt as follows :

> "JACOB BERRY & Co.,
>
> NEW YORK, Nov. 1, 1904.
>
> Received of George E. Hall, Certificate No. 7350 D. 20 Ice Common, 7215 D. 10 Ice Common, F. 38401 and A. 47114 10 each United States Steel Common. Held as collateral.
>
> JACOB BERRY & Co." (*fol. 154*).

Mr. Hall testified :

> "I had that margin account with them and was carrying the ordinary account and I placed the certificate of stock as collateral for any indebtedness I might owe them at any time instead of putting cash into their hands for margin" (*fol. 149*).

On the same day Mr. Hall ordered the purchase of fifty shares American Ice for which he delivered no margin other than the certificates.

He received a bought notice as follows, dates, names and prices of course being filled in in the original :

"JACOB BERRY & Co.

Members of N. Y. Consolidated Stock Exchange, N. Y. Produce Exchange, Philadelphia Stock Exchange.

Bankers and Brokers, 42 Broadway.

New York, , 190 .

Philadelphia, Boston, Hartford, Montreal, Springfield, New Haven, Albany, Brooklyn, Quebec, Sorel, Bridgeport.

M—

It is understood and agreed that all orders to buy or sell stocks, bonds, securities or commodities are to be executed in accordance with and subject to the rules and customs of the Consolidated Stock and Petroleum Exchange of New York, or the Exchange where such transactions are made, and all orders executed by Jacob Berry & Co. are accepted whether the order be given in writing, orally, or by telegraph or telephone. It is agreed that Jacob Berry & Co. is appointed as agent to receive and deliver stocks, bonds, securities or commodities bought or sold for my account, with power to hypothecate, re-hypothecate, pledge or repledge, or loan any of said stocks, bonds, securities or commodities therefor, and to substitute similar certificates, and the said Jacob Berry & Co. are authorized upon the approximate exhaustion of margin, without notice to me, to buy or sell, as the case may be, any stocks, bonds, securities or commodities held by them for my account as collateral for margin or otherwise providing such purchases or sales be made upon the Consolidated and Petroleum Exchange of New York, the New York Stock Exchange, the Chicago Board of Trade, or upon any other Exchange in the City of New York, where such stocks, bonds, securities or commodities are dealt in.

We have this day bought for your account and risk, subject to above conditions.

Amount. Description. Price. Name.

JACOB BERRY & Co.

Per — —."

On the 25th day of November, 1904, Jacob Berry & Co., were carrying on margin for Mr. Hall fifty shares American Ice Co., 100 shares Texas Pacific Railway and 100 shares Chicago and Great Western Railway, for which Mr. Hall had not paid and had as collateral on margin the certificate for ten shares United States Steel stock sought to be reclaimed, together with other securities (*fol. 151*).

The ten shares of Steel stock were delivered to the Bank as collateral for the Berry loan and by the Bank returned to the trustees with the other unsold collateral (*fol. 151*). Apart from the stock deposited as collateral, Mr. Hall's account if closed would show a profit of $275 on November 26th, 1904 (*fol. 151*).

On December 19th, 1904, Mr. Hall filed a proof of claim in bankruptcy in the amount of $1,875, which specifically included the value of the certificate of stock he seeks to reclaim in this proceeding. Mr. Hall's proof of claim stated the facts upon which his claim was based and contained the following:

> "Said deponent hereby stipulates that by filing a notice of this claim he does not waive any right of action that he now has to recover possession of said certificates, or the value thereof, against either of the bankrupts, or any person in whose possession they may be found, or any right of action that he has against either or both of said bankrupts for the conversion of said certificates to their own use, when said bankrupts knew that said certificates were not their property and never had been; and that the said deponent does not waive any right whatsoever of any kind, nature or description against the said bankrupts, or either of them, for or on account of the failure of the bankrupts or either of them to return said certificates to said deponent, and for the unlawful hypothecation and conversion of the same by said bankrupts or either of them."

At the first meeting of creditors on the 19th day of December, 1904, Mr. Hall voted his claim for Ashbel P. Fitch for trustee in bankruptcy in a contest between Mr. Fitch and Mr. Thomas. This vote was cast on what the referee called an informal ballot for the purpose of obtaining an expression of opinion.

At the formal election of trustee, on the 21st day of December, 1904, Mr. Hall did not vote for either candidate (*fol. 152*). His claim has never been withdrawn or reduced by withdrawing from it the value of the ten shares of United States Steel stock which he seeks to recover, nor has he ever expressed a willingness or made an offer to so reduce his claim.

The referee found that Mr. Hall "participated actively at the meetings held for the election of a trustee," and said that this would bar the prosecution of the present claim except for the reservation contained in the proof of claim filed (*fols. 48, 49*).

We urge that this filing of proof of claim in bankruptcy effectually precluded Mr. Hall from recovering in this reclamation proceeding. When Berry & Co. became bankrupt, Mr. Hall had optional remedies to pursue. He could either file a claim as a creditor in bankruptcy and participate in the estate in bankruptcy and in the control of that estate to the extent which his vote as a creditor entitled him, or he could bring a proceeding in the nature of a replevin to recover the certificate of stock.

Either of these methods he could pursue, both he could not; yet that is exactly what he attempted to do.

He filed his claim in bankruptcy for the full amount, giving notice therein that he did not intend to deprive himself of his right to follow the other course. He sought by force of his own frank

statement of intention to enlarge his legal rights. The law says: "You may do this thing or that thing, but you cannot do both." Mr. Hall said: "I will do this thing and also that thing."

To file his claim as a creditor he was compelled to ratify the conversion of the stock and affirm that title had passed. To reclaim his certificate of stock he had to take the exactly contrary position that there had been no conversion and that title was still in him. His proof of claim was filed on the 19th day of December, 1904 (*fol. 48*).

His first effort to reclaim the certificate of stock was made subsequent to March 25th, 1905.

Having chosen to file his claim in bankruptcy Mr. Hall is bound by that election, irrespective of any intention to preserve his right to the other and inconsistent remedy.

Bowker Fertilizer Co. vs. *Cox, 106 New York, 555.*

Fowler vs. *Bowery Savings Bank, 113 New York, 450.*

Conrow vs. *Little, 115 New York, 387.*

Terry vs. *Munger, 121 New York, 161.*

Mills vs. *Parkhurst, 126 New York, 89.*

Droedge vs. *Ahrens, 163 New York, 466.*

In *Terry* vs. *Munger* (*121 New York, 161*), personal property belonging to the plaintiff was wrongfully taken, and while still in the possession of one defendant, the plaintiff sued another party to the transaction on contract *to recover the value* thereof; later the plaintiff sued the other party to recover damages for the alleged conversion of the same property; PECKHAM, *J.*, said:

"Any decisive act of the plaintiffs, with

knowledge of all of the facts, would determine their election in such a case as this. The proof that an action of that nature had been in fact commenced would have been just as conclusive upon the plaintiffs upon the question of election * * * as could the judgment have been. It is not necessary that a judgment should follow upon the action thus commenced. * * * It was also held that a discontinuance of that action was immaterial. It was the fact that the plaintiffs once elected their remedy and acted affirmatively upon such election that determined the issue. After that the option no longer existed, and it was of no consequence, therefore, whether the plaintiffs did or did not make their choice effective. When it became necessary to choose between inconsistent rights and remedies, the election will be final, and cannot be reconsidered even where *no injury has been done by the choice, or would result from setting it aside.*"

In *Conrow* vs. *Little* (*115 New York, 387*), the plaintiff contracted to sell certain paper; after delivering a portion of the contract, it was discovered that the note which was given as an inducement to the plaintiffs, entering into the contract, was a forgery. Plaintiff brought an action for the value of the paper alleging the fraud, and sued out an attachment against the property of the purchaser and levied. The attachment suit was discontinued and an action was brought to recover possession of the paper. DANFORTH, *J.*, said:

"The contract between Branscom and the plaintiffs was, upon the discovery of Branscom's fraud, voidable at their election. As to him, the plaintiffs could affirm or rescind it. *They could not do both*, and there must be a time when their election should be considered final. We think that time was when they commenced an action

for the sum due under the contract, and in the course of its prosecution applied for and obtained an attachment against the property of Branscom as their debtor. They then knew of the fraud practiced by them, and disclosed that knowledge in the affidavit on which the attachment was granted, and became entitled to that remedy because it was made to appear that a cause of action existed in their favor by reason of 'a breach of contract to pay for goods and money loaned, obtained by fraud.' The attachment was levied, and the action pending when the present action, which repudiates the contract and has no support except on the theory of its disaffirmance, was commenced. The two remedies are inconsistent. By one the whole estate of the debtor is pursued in a summary manner and payment of a debt sought to be enforced by execution; by the other, specific articles are demanded as the property of the plaintiff. One is to recover damages in respect of the breach of contract, the other can be maintained only by showing that there was no contract. After choosing between these modes of proceeding, the plaintiff no longer had an option. By bringing the first action, after knowledge of the fraud practiced by Branscom, the plaintiffs waived the right to disaffirm the contract, and the defendants may justly hold them to their election.

It is not at all material to the question that the plaintiff discontinued the first suit before bringing the present to trial, for it is a fact that the plaintiffs elected this remedy and acted affirmatively upon that election; that determines the present issue."

Mr. Hall made his election when he filed his proof of claim. While still adopting the position of creditor and ratifying the conversion by proving for the value, he brought the new action for the recovery of the certificate. It is his act which binds

him and he cannot escape the legal effect of that act by any declaration made while doing it.

The referee has found that the claimant actively participated at the meetings held for the election of a trustee and his finding of this fact is conclusive, although the claimant did not vote his claim at the formal election of trustees on the 21st day of December (*fol.* 48). The filing of the proof of claim and the voting thereon for trustee, even at an informal election, is inconsistent with the claim of ownership to the stock, and bars any later reclamation proceedings for the property.

Le Marchmont vs. *Moore*, *150 New York, 209* (*p. 218*).
In re Bloss, *No. 1562*, *Fed. Cas.*
New Bedford Ins. vs. *Fairhaven Bank*, *9 Allen, 175, 180.*
Ex parte Solomon, *1 Glyn & J., 25.*
Haxton vs. *Corse*, *2 Barb. Ch., 531.*
Loveland on Bankruptcy, *2nd Ed., p. 339.*

Le Marchmont vs. *Moore* (*150 N. Y., 209*), was a case in which plaintiffs had ordered stock purchased for them by brokers who subsequently made a general assignment for the benefit of creditors; the stock in question was held by the defendants for the broker's own account. Defendant sold the stock and turned the balance over to the assignee partly in stock certificates and partly in cash. Thereafter plaintiff filed proof of claim against the insolvent brokers. The Court said, on *page 218*:

"Ordinarily the plaintiffs would be entitled to recover the value of the Boston Air Line stock, or to have had that stock sold and the proceeds applied upon the indebtedness of Evans & Company (the insolvents) before the sale of the plaintiffs' stock. But, as we have seen, the plaintiffs, with full knowledge of all the facts, have proved and

filed their claim against the assigned estate for the full amount, less only the surplus derived upon the sale of the plaintiffs' stock.

It is stated in the submission of the controversy that this was done after the commencement of this action. The submission is dated the 14th of March, 1894. The proof of the claim is dated June 1st, 1892.

We are unable to understand how a claim could be proved after the submission of a controversy, and still the facts of such proof be incorporated in the submission. It is possible that an action had been previously brought, but we find no mention of it in the facts agreed upon. We cannot assume the existence of facts not incorporated in the submission for the purpose of reversing or adding to a judgment, neither can we determine whether or not the plaintiffs have received a dividend through the assignee upon their claim.

We are, therefore, of the opinion that the plaintiffs have waived their right to recover the value of the Boston Air Line stock."

In the *New Bedford Institution* vs. *Fairhaven Bank* (*9 Allen, 175, p. 180*), CHAPMAN, *J.*, said:

"But it is objected on the part of the plaintiffs that the defendants have forfeited their right to have this application made for their especial benefit, because they first proved their debts and then made use of their position as creditors to vote for the discharge of the debtor, and that they have thereby affected the rights of the plaintiff injuriously. * * *

But the fact that the defendants thus acquired the power to control the vote of creditors on the question of the debtor's discharge and actually exercised that power, and procured the discharge, must be considered as a material interference with the rights of other creditors. * * * After they have done this on the ground that they have no lien on

the mortgage, it is not equitable to permit them to insist upon the lien, and thus obtain a preference over other creditors. The equitable considerations which favor the equal distribution of assets among the creditors ought not to be set aside in such a case. On the contrary, we think the defendants should be bound by the position which they have taken.

But the defendants contend that the acts referred to were done by them in ignorance of the fact that they had a lien. * * * Whatever their ignorance may have been, if they have ignorantly proceeded in such a manner as to affect the rights of other parties, the injurious consequences of their acts ought to be thrown upon themselves, and not thrown upon others."

In *Ex parte Solomon* (*1 Glyn & J., 25*), the Vice-Chancellor said:

"The only question was whether Heath, having proved, and voted in the choice of assignee, and signed the bankrupt's certificate, was bound to abide by his proof and deliver up the patent, or was still at liberty to retract his proof, and resort to the patent in satisfaction of his debt *pro tanto*. * * * The signing of the certificate is an act affecting the interests of the rest of the creditors, and the party must abide by his proof and deliver up the patent."

Loveland on Bankruptcy (*2nd Ed., p. 339*), says:

"Where a creditor by proof of his debt has taken part in the meetings of creditors and controlled the action of others in the choice of a trustee, or influenced the question of the bankrupt's discharge, he has been held precluded from any subsequent change in his proof."

The claim of Mr. Hall should, therefore, be dismissed.

V.

Mr. Donaldson's claim.

Mr. Donaldson, on or about the 31st day of October, 1904, delivered a certificate of three shares of U. S. Steel Corporation to Jacob Berry & Co. in order that he might deal in stock on margin. It was verbally agreed that the stock was deposited as collateral security for the account (*fol. 141*). No receipt was given. Various purchases were made by Donaldson and a bought notice was sent on the same form as that sent Mr. Hall, which is printed in full in the preceding point of this brief (*fols. 141–142–146*).

Berry & Co. pledged the certitificate in question to the Hanover National Bank to secure their personal loan, and the certificate was sold by the Bank realizing $283.87. Mr. Donaldson's claim was for a lien upon the funds returned from the Bank (*fols. 142–3*).

This case emphasizes the different conditions which existed in the other cases.

In the Taggart case there was an express and specific contractual right given to the brokers to loan or pledge the deposited certificates and to substitute others therefor, totally destroying the relation of pledgor and pledgee.

In the Bowers case there was an express contractual right to apply the certificates deposited in part payment of stock purchased, which was exercised.

In the Filson case the certificates deposited were paid to the brokers for other stock.

In the Hall case there was a renunciation of the right to recover the certificates deposited by reason of the election to treat the brokers' acts as a concession.

VI.

Conclusion.

The order below should be be reversed as to the Filson, Taggart, Bowers and Hall claims.

Respectfully submitted,

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Supreme Court of the United States.

EDWARD S. THOMAS, LLOYD M. POWELL and ASHBEL P. FITCH, Trustees in Bankruptcy of Jacob Berry and Harold L. Bennett, individually and as Jacob Berry & Company, Petitioners,

vs.

ANNA D. TAGGART *et al.*

Brief on behalf of Harris Filson, claimant to proceeds of twenty shares preferred stock of the Atchison, Topeka and Santa Fe Railroad Company, appellee.

Statement.

Appeal by Trustees in Bankruptcy on writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit, from a decree affirming an order of the District Court, Southern District of New York, confirming order of Stanley W. Dexter, Esq., Special Commissioner in reclamation proceedings.

This case has been advanced, by an order of this Court, so as to be heard at the same time as the case of Richardson, trustee, *v.* Shaw *et al.*

The facts upon which this controversy turns are entirely undisputed.

Jacob Berry & Company, bankrupts, who were brokers, doing business on the Consolidated Stock

Exchange in the City of New York, finally closed their doors at the close of business on the afternoon of the 25th day of November, 1904, making a general assignment on the morning of the 26th of November, 1904, and going into bankruptcy within two or three days thereafter.

The appellee, Harris Filson, had for some time been a customer of Berry & Company, trading through them on both sides of the market.

On the morning of the 25th day of November, 1904, being the last day on which Berry & Company transacted business, as above stated, the state of Mr. Filson's account with the firm was as follows:

He was long ten shares U. S. Steel common, ten shares American Car and Foundry common, ten shares Wabash, and forty half-shares of Pennsylvania; he was short twenty shares of Atchinson preferred, ten shares Erie first preferred, ten shares U. S. Steel preferred, and ten shares Amalgamated Copper, and he had a cash balance to his credit of three thousand one hundred and five 97/100 dollars; that is, the above was the nominal situation of Mr. Filson's account. At previous dates he had given orders for the purchase and sale of the securities above mentioned; had furnished margin, as required by Berry & Company, for the purchase and sale of such securities, and they had reported to him that the securities had actually been purchased or sold, as shown by the above statement. There is sufficient evidence, however, to justify a finding, if such finding were necessary to appellee's case, that the whole thing was a fraud on the part of Berry & Company, and that they had not actually purchased and sold said securities as directed, and as they reported that they had done, but had simply taken the claimant's money and had made bookkeeping entries to his debit or credit as the case might be; or, in the vernacular of the

street, had taken Mr. Filson's money and bucketed his orders.

On the morning of the 25th of November, 1904, Mr. Filson called at the office of the bankrupts. He testifies that the object of his call was to arrange for the taking out of the account and the actual transfer to his wife of the forty half shares of Pennsylvania stock which Berry & Company were supposed to be carrying long for him. His account was amply margined, and no call had been made upon him by Berry & Company for further margin. He took with him a certificate for ten shares of Atchison first preferred. He enquired of the bankrupts' bookkeeper as to the state of his account and as to how much additional security it would be necessary for him to put up in order to procure the release of his forty half shares of Pennsylvania (page 43, Transcript of Record).

The bookkeeper, after looking up the account, said that the ten shares of Atchison preferred which Mr. Filson had with him would leave too small a margin to release the Pennsylvania stock and carry the other stocks. Thereupon Mr. Filson returned to his safe deposit box, took out a certificate of ten shares of Erie first preferred and another certificate for ten shares of Atchison preferred, took them back to the bankrupts, and the bookkeeper reporting that the deposit of these additional shares would furnish ample security, Mr. Filson left the shares with the cashier, with instructions forthwith to transfer to his wife's name the forty half shares of Pennsylvania stock, and the bankrupts accepted said stocks, including the twenty shares of Atchison preferred in question for the purpose of having transferred, and upon the sole condition that they would immediately procure the transfer to Mrs. Filson of the forty half shares of Pennsylvania stock in question, and which they were supposed to be carrying long for the plaintiff (pages 43, 50 of Transcript).

Mr. Filson received receipts from Berry & Company for the stock so deposited with them, setting forth the numbers of the respective certificates, and which also recited that the said stocks were to be held by Berry & Company "as margin and as security" for the transactions of Mr. Filson with said brokers (page 47 of Transcript).

Instead of having the Pennsylvania stock transferred, as claimant ordered, and as they undertook to do, the bankrupts, the same day, pledged the twenty shares of Atchison preferred with the Hanover Bank for a loan for their individual benefit, and transferred no Pennsylvania stock to claimant (page 44 of Transcript), and the next morning, when they suspended business, no Pennsylvania stock whatever was found in the possession of the bankrupts, or as collateral for any loans that they had outstanding (page 45 of Transcript).

The Hanover Bank, with whom claimant's stock was pledged by the bankrupts, together with other stocks, as collateral security for a loan made by said bank to the bankrupts, sold said stock for the sum of $2,072.50 (page 44 of Transcript).

After applying a balance which the bankrupts had with the bank and the proceeds of the stocks sold by it, there remained a cash balance in the hands of the bank of $6,310.41, and certain unsold stocks, which cash balance and unsold stocks the bank, by order of the District Court, turned over to the trustees in bankruptcy, without prejudice to the claims of the respective claimants thereto.

POINTS.

First.—The conceded facts of this case show a clear conversion by the bankrupts of the twenty shares of Atchison preferred deposited with them by the claimant Filson.

This was so, notwithstanding the unquestioned fact that the stock was delivered to the bankrupts with the right, upon certain conditions, to use the same as collateral, in accordance with the customs of stock brokers.

This stock was delivered to the bankrupts for the sole purpose of procuring the release of the Pennsylvania stock, and upon the condition that the Pennsylvania stock should be so released (pages 43, 44, 48, 49, 51, 53 of Transcript).

The release of Mr. Filson's Pennsylvania stock was a condition precedent to the right of Berry & Company to use the Atchison stock for any purpose whatsoever.

If the bankrupts had satisfied the condition upon which the stock was delivered to them; that is, if they had released the Pennsylvania stock, they would then have had a right to use this Atchison stock in the same way they had the right to use the Pennsylvania stock; that is, as collateral for any loan necessary to raise the amount to pay any unpaid amount due upon the stocks that they were carrying for Mr. Filson; but when the bankrupts accepted the stock upon the condition that they should release and transfer the Pennsylvania stock, and did not transfer the Pennsylvania stock, but used the Atchison stock for their own purposes, they then diverted the Atchison stock from the sole purpose for which it was deposited with them, and were guilty of a conversion of it.

The situation is precisely the same as where a person issues a promissory note, and entrusts it to

a third person to be used for some particular purpose, and the person to whom the note is entrusted diverts it from the purpose for which it was entrusted to him, and uses it for some other and different purpose, and thereby becomes guilty of a conversion of the note, although, if he had used the note for the purpose for which it was entrusted to him, he could have transferred a good title even to a person who took with knowledge of all the facts.

It is familiar law that in the case of receipts and other instruments incomplete upon their face, parol evidence can be given of the remainder of the agreement, and also that parol evidence is admissible to show an agreement annexed to the delivery of an instrument affecting the consideration thereof, and constituting a condition precedent to the taking effect of the instrument.

Chapin *v.* Dobson, 78 N. Y., 74.
Thomas *v.* Scutt, 127 *Id.*, at page 138.
Reynolds *v.* Robinson, 110 *Id.*, 654.

There can be no doubt upon the evidence as to the conditions upon which the twenty shares of Atchison stock in question were deposited by Mr. Filson with the bankrupts.

The bankrupts were supposed to be carrying for Mr. Filson forty half shares of Pennsylvania stock previously purchased by them for him. This Pennsylvania stock they held, of course, as collateral to Mr. Filson's account.

The purpose and intent of the transaction on the morning of the 25th of November, 1904, was to substitute the Atchison stock for the Pennsylvania stock, and thereby release to Mr. Filson the Pennsylvania stock. This fully appears, not only from Mr. Filson's uncontradicted testimony, but also from the terms of the receipt given by the bankrupts, and from the memorandum entered on the same day by

the bankrupts in Mr. Filson's account upon their books (page 56 of Transcript).

Counsel for appellants detaches from the body of Mr. Filson's testimony an answer to a single leading question, to wit: "Q. Stock that you delivered then was to be used as the purchase price of the Pennsylvania stock? A. Yes, sir" (page 49 of Transcript), and endeavors to argue from that answer an intention on the part of Mr. Filson to transfer the title to his Atchison stock to the bankrupts upon an executory agreement by the latter to purchase for him forty half shares of Pennsylvania stock.

The transaction will bear no such construction; it evinces no intention on the part of Mr. Filson to part with the title to his Atchison stock. He deposited it with the bankrupts, with power on their part to use it as margin to protect Mr. Filson's transactions with them, provided they first released to him the Pennsylvania stock, in substitution for which the Atchison stock was delivered to them.

There is no inconsistency between the position we now take and the receipt which Berry & Co. gave to Mr. Filson.

The receipt states that the stocks are deposited with, not sold to, Berry & Co., and are to be held as margin or security for the depositor's transactions in purchase and sale of stocks. Berry & Co. are given no authority to use the stocks for any purpose unless it should become necessary for their protection in transactions entered into by them in obedience to the orders of their customer.

Not having executed Mr. Filson's order to transfer to him 40 half shares of Pennsylvania stock, Berry & Co. had no right to use the Atchison stock for any purpose.

Second.—If there had been no special agreement at the time of the deposit of the Atchison stock limiting the right of Berry & Co. to use it for the special purpose mentioned, claimant would still be entitled to recover his stock or the proceeds thereof.

There was nothing in the terms of the receipt or in the customs of stockbrokers applicable to the case to imply an intent on the part of his customer to part with the title to his stock by the mere fact of delivery of same to the broker.

The clear intent of the transaction was to deposit the stock as margin for the protection of the broker If the broker failed to execute his customer's orders and never used it as margin, and had no occasion to use it for his protection, it is absurd to claim that by the mere fact of the deposit the customer as against the broker, and those claiming under him, has lost title to his stocks.

Under the circumstances it seems to us entirely unnecessary for counsel for the claimant Filson to enter into any discussion of the elaborate argument presented by counsel for the trustees in reference to the legal relations existing between stockbrokers and their customers.

Berry & Co. executed no order of Mr. Filson's after the deposit of the stock in question. What might have happened if Berry & Co. had assumed any obligations on the faith of the deposit with them by Mr. Filson of the stock in question is quite immaterial therefore in Mr. Filson's case.

We understand, however, that it is conceded by counsel for the appellant that under the rule as established by the New York courts the relation between a customer and broker is that of pledger and

pledgee, and he claims that this Court should adopt a different rule.

Although this Court may not be bound to follow the decisions of the New York State Courts on this question, yet it is respectfully submitted it should not refuse to do so except for the weightiest of reasons.

It is easy to be seen that it would give rise to endless confusion if, in the City of New York, the greatest financial centre of the world, two rules should exist for regulating the stupendous financial transactions there carried on; one of such rules being administered by the State courts and the other by the United States courts.

The relations in the City of New York between stockbrokers and their customers are regulated by customs long established and having the effect of local usage or local law. The decisions of the State courts upon that subject are simply declaratory of this usage.

In the case of Swift (112 Fed. Rep), relied upon by counsel for the trustees, the United States Court sitting in Massachusetts, professedly administered the local law of Massachusetts as determined by local customs of brokers in that State and the decisions of Massachusetts courts declaratory of the same.

As pointed out by the learned Referee, this printed form of receipt of Berry & Company gave them no greater powers of disposal in respect to the collateral than they already possessed by law and custom, except in one particular only, to wit: they were permitted to sell the pledged securities without notice, but only "after the approximate exhaustion of margins." And, as stated in the opinion of the Court below, "the relation of pledgor and pledgee certainly continues until losses arise which justify a sale of the stock" (page 98 of Transcript).

The right of substitution of like securities, upon which such stress is laid by counsel in his argu-

ment, is one which custom gives to stockbrokers, to be exercised when necessary for their protection. The reason why such substitution does not make the broker liable to an action for conversion, provided the broker keeps on hand a sufficient amount of like securities to answer the demand of his customer, is pointed out by the Court of Appeals in Caswell *v.* Putnam (120 N. Y., 153). See also Douglas *v.* Carpenter (45 N. Y. Supp., 219).

Clearly, as long as the identity of the stock is not lost, the title thereto remains in the customer, except as against a *bona fide* purchaser or pledgee.

A fair construction of the receipt is that no right of substitution, or any other use of the stock, on the part of the broker exists, unless some exigency should arise in the course of his dealings with his customer making it necessary for the broker to use the stock for the purpose of his customer's business.

In consideration of his executing such orders as his customer should give him, the broker was authorized to use the stock in the manner specified in the receipt as collateral to the obligations of his customer to him.

If he did not execute his customer's orders, or if no occasion should arise in the course of his dealings with his customer to use the stock, he certainly could not, under any fair construction of the receipt, have any right to use the pledged stock for his own purposes, or to hold title thereto as against his customer.

It is entirely clear, therefore, in the case at bar, no matter what views the Court might hold upon the general subject of the relations between brokers and their customers, that Berry & Company, not having executed the order given to them by Filson when he deposited the stock, and confessedly having had no occasion to use it for the protection of the other deals which Filson had with them, had no right to pledge the stock to the Han-

over Bank, and if it had not been pledged, but had remained in their possession, the trustee in bankruptcy, who has no greater rights than the bankrupts themselves would have possessed, could not have withheld the same from the claimant.

Suppose a man goes to his broker; directs him to purchase, say one hundred shares of N. Y. Central, and delivers to the broker, say twenty shares of Atchison stock to be held by the latter as collateral to the obligations to be assumed by the broker in making purchase of the Central stock, can it soberly be claimed that the customer has thereby, *eo instanter*, lost the title to his stock, and that the broker, without executing his customer's order, can hold the stock deposited as his own property, leaving his customer no remedy but an action upon implied contract for the value of the stock, so that if the broker should fail, the remedy of the customer would be limited to proving his claim and taking his dividend?

The foregoing situation precisely fits the Filson case, with the added fact that the brokers, in addition to neglecting to execute their customer's order, wrongfully pledged the stock for their own use—to obtain a loan for themselves.

Third.—Claimant clearly identified the proceeds of his stock, and the decree appealed from affirming the order, so far as respects the claim of Harris Filson, should be affirmed, with costs.

All of which is respectfully submitted.

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Supreme Court of the United States.

EDWARD S. THOMAS and others,
Petitioners,

AGAINST

ANNA D. TAGGART and others,
Respondents.

No. 197.

October Term, 1907.

SUPPLEMENTAL BRIEF FOR RESPONDENT ANNA D. TAGGART.

When we prepared our brief in behalf of the respondent Anna D. Taggart we had not seen the brief which has been filed by the petitioners. We prepared our brief upon the assumption that the petitioners would rely in this Court upon the arguments which they advanced before the Circuit Court of Appeals and in their petition to this Court for a writ of *certiorari*. We now see that the petitioners have abandoned a number of the arguments heretofore advanced, and, among others, the argument that the relation between Mrs. Taggart and Berry & Company with reference to securities purchased and carried for her or with reference to the Steel stock delivered by her to Berry & Co. is not governed by local law, but should be governed by general law, and that the true relation is

debtor and creditor rather than pledgor and pledgee. We now understand the petitioners to admit that the relation with respect to the securities purchased and carried by Berry & Company for Mrs. Taggart's account is governed by the New York law and was pledgor and pledgee, and to argue that the relation with respect to the Steel stock delivered by Mrs. Taggart to Berry & Company was by Exhibit C stipulated out of the New York doctrine. (Petitioners' Brief, p. 13). It thus appears that the question of the conflict of law between Massachusetts and New York and between the Circuit Courts of Appeal of the First and Second Circuits, which are made the basis of the petition for the writ of *certiorari*, is no longer involved in the case. Much that is said under our fourth and fifth points is accordingly inapplicable.

It being admitted that the relation between Mrs. Taggart and Berry & Company with reference to securities purchased and carried for her is governed by New York law, it must necessarily follow that the relation created by a delivery of securities by Mrs. Taggart to Berry & Co. "as margin" would also be governed by New York law. The New York courts have held uniformly that the relation created by the delivery of securities by a customer to a broker "as margin" is pledgor and pledgee, the transaction being nothing more or less than a pledge of the securities to protect the broker against loss on the customer's transaction, and that the customer has the right, upon paying his indebtedness to the broker or otherwise discharging the broker's lien, to redeem the securities from the broker or his assignee.

DeCordova v. *Barnum*, 130 N. Y., 651.
LeM[illegible]ant v. *Moore*, 150 N. Y., 209.
Willard v. *White*, 59 Hun, 581.
Sillcocks v. *Galladet*, 66 Hun, 522.

Hence, the arguments on pages 8 and 9 of Petitioners' brief as to the meaning of the provisions of

Exhibit C that Berry & Co. might hold the Steel Stock "as margin" are of no avail. These words must here be given the meaning attributed to them by the New York law.

Petitioners further argue (p. 7) that the words "the same to be a general deposit" are not in accord with the idea of a deposit as collateral security. Petitioners do not, however, go so far as to argue that these words affirmatively indicate a sale, and for such an argument there could be no foundation. The word "deposit," when applied to securities, is certainly contrary to the idea of a sale. A seller of securities does not "deposit" them with the purchaser. The word indicates that the depositor is to receive the securities back at some time and in some form. This provision of Exhibit C obviously means that the securities deposited are to be held generally as security for all claims against the person depositing, and not specially as security for some particular claim.

Respectfully submitted,

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GRAHAM SUMNER,
EDWIN W. LAWRENCE,
Of Counsel for Respondent
Anna D. Taggart.

Supreme Court of the United States.

EDWARD S. THOMAS LLOYD M. HOWELL, AND ASHBEL P. FITCH, Trustees in Bankruptcy of Jacob Berry and Harold L. Bennett, individually and as Jacob Berry & Company, Petitioners,

vs.

ANNA D. TAGGART, *et al.*

No. 197

Brief on Behalf of George E. Hall, Respondent.

FACTS

For about one month prior to the failure of Berry & Co., on November 26, 1904, George E. Hall had an account with the bankrupt firm who had purchased for him certain shares of stock. As collateral security for his account he had turned over certain certificates of stock owned by him as follows: October 17, 50 shares of A. I. Common; and November 1, 30 shares of A. I. Common (2 certificates); and 20 shares of U. S. Steel Common (2 certificates), (R. Pgs 86-87). One of the latter certificates for 10 shares of U. S. Steel Common, No. A-47114, is the certificate now sought to be reclaimed.

On the day of the failure Berry & Co. sold the stock bought for Hall on margin, and, after such sale, owed

him $275.00 in addition to his collateral (R. Pg. 87) and held in their possession the said 80 shares of A. I. Common and 10 shares of the U. S. Steel Common stock. The day previous to the failure Berry & Co. had, without Hall's knowledge or consent, delivered said certificate No. A-47114 to the Hanover National Bank as part security for a loan to Berry & Co. of $45,000.00. Berry & Co. did not assign the certificate to the Hanover National Bank but simply delivered it with the power of attorney (Ex. D. R. Pg. 90) attached thereto.

The Hanover National Bank afterward returned to the petitioners as trustees of Berry & Co. certain certificates of stock, among which was Hall's certificate No. A-47-114 (R. Pg. 87). Hall immediately brought reclamation proceedings to obtain possession of his collateral, and has obtained, through an order of this Court, the return of all (R. Pg. 27) except said certificate No. A-47114, now in the possession of the trustees, free from any claim or lien on the part of the Hanover National Bank, or the trustees.

POINT I.

THE LEGAL AND EQUITABLE TITLE TO THIS CERTIFICATE IS IN GEORGE E. HALL.

Hall did not endorse the certificate nor execute an assignment of it to Berry & Co. but simply annexed a power of attorney thereto (Ex. D. R. Pg. 90), which was received by Berry & Co. to be "Held as collateral" (Ex. B. Pg. 89). This power of attorney merely gave Berry & Co. power "for *me* (Hall) and in *my name* and *behalf to sell, assign and transfer*" the certificate. Berry & Co. had no title to this certificate and the words "sell, assign and transfer" are all words of sale and cannot be construed to mean pledge. A power to sell is not a power to pledge, and an agent to sell has no authority to pledge.

Merchants' Bank *v.* Livingston, 74 N. Y., 223.
Henry *v.* Marvin, 3 E. D. Smith, 71.
Halliwell, Stocks and Stock Brokers, p. 681.
Story on Agency, Sec. 78.

The Hanover National Bank had actual notice from the certificate and the power of attorney that Hall and not Berry & Co. had title thereto and that Berry & Co. had no authority to pledge it for a loan.

Merchants' Bank *v.* Livingston, *supra.*

Title could not be had through Berry & Co. except by exercise of the authority conferred in said power of attorney, mere transfer of possession not being sufficient. Consequently the Hanover National Bank was not a bona fide holder of the said certificate and had no valid lien thereon and the same was not sold or transferred by them for the very obvious reason that they had no power to do so.

The receipt (Ex. B. R. Pg. 89) sets forth the contract Hall had with Berry & Co. and must not be confused with those received by Filson, Taggart & Bowers, the other claimants, as illustrated by the receipt to Taggart (Ex. C. R. Pg. 76), which contained language not found in the Hall receipt. "Held as collateral" tells the whole story and Berry & Co. had no more rights over this certificate than the law implies to any pledgee of stock. This conclusion is supported by an examination of the said power of attorney which is silent as to any authority to pledge, or to use for the benefit of Berry & Co., it providing that the powers conferred are to be exercised for "*me* (Hall) and in my behalf". The language of said receipt is unequivocal and clear, the word "held" signifying to hold, retain possession of, and it is ridiculous to contend that authority is given to dispose of the certificate. In addition to the receipt is the express agreement of the agent of Berry & Co. to "keep it (certificate) in the New York office". (R. Pg. 87). It is a reasonable inference to draw from the fact that Hall did not accept the usual receipt of Berry & Co., in the form of Exhibit C (R. Pg. 76), that he did not desire Berry & Co. to have the powers therein conferred, but that they should hold the certificate and not dispose of it except to protect themselves upon the account. The question here is largely one of contract and not the construction of laws of various states, and it is claimed, that

as the contract provided that the stock was to be "held as collateral", "In the New York office", and there being no reason why it should be further held for such purpose, it should be returned forthwith, its mission as security being fulfilled.

Hennequin *v.* Clews, 111 U. S., 676-682.

If the Hanover National Bank had any claim on the certificate by reason of the wrongful attempt of Berry & Co. to pledge it, the same is now satisfied in full, and the certificate is held by the trustees free from any lien. Under such circumstances the law is well settled that the owner is entitled to his certificate.

Union Pacific Ry. Co. *v.* Schiff, 78 Fed. Rep., 216,
LeMarchant *v.* Moore, 150 N. Y., 209.
Smith *v.* Savin, 141 N. Y., 315 at 326.
Farwell *v.* Bank, 90 N. Y., 483.
Rhinelander *v.* National City Bank, 36 App. Div. 11, (N. Y.)
Thompkins *v.* Morton Trust Co., 91 App. Div., 274, (N. Y.)

The trustees claim that Hall has lost title to the certificates. If so, when and how? Was it when Berry & Co. acquired possession of the certificate? No, because the same was "held as collateral", to be "kept in their New York office," and the power of attorney accompanying the certificate did not transfer the title. Was it between November 1st, when Berry & Co. received the certificate, and the 25th, when it passed into the possession of the Hanover National Bank? No, because nothing had transpired to change the contractual relation of pledgor and pledgee. That Berry & Co. held the certificate during this time is strong presumptive evidence that they considered themselves pledgees only and not until the day before the failure did Hall's certificate leave their possession, when they were in dire financial difficulties, and in a last hopeless effort to raise money, they threw all their moral and legal obligations to the four winds and converted the stock of all of their customers to their own use, as is evidenced by the cases of

the several respondents herein. Was it when Berry & Co. gave the certificate to the Hanover National Bank? No, because title thereto did not pass with the possession but only by exercise of the authority conferred in said power of attorney, as heretofore discussed, which power should be evidenced by some proper assignment or transfer in writing signed by Berry & Co. No such document was ever executed and hence no title to the certificate passed to the Hanover National Bank and the mere physical custody of it by them for a limited time gave them no more rights, so far as the title was concerned, than would be acquired by a messenger boy or a clerk who might happen to be the temporary custodian of it. Was it by filing the proof of claim? No, because if Berry & Co. had no title to the certificate, as herein argued, then the filing of a proof of claim conferred none on the trustees. It has been held that a stock broker has the right to hypothecate stock *bought on margin* by him for his customer. Yet in such cases the title to the stock vests in the customer immediately upon its purchase subject to the broker's lien for any unpaid balance, and upon payment of such balance the customer is entitled to and may reclaim his certificate.

Union Pac. Ry. Co. *v.* Schiff, 78 Fed. Rep. 216.
Thompkins *v.* Morton Trust Co., 91 App. Div. 274, (N. Y.)
Douglass *v.* Carpenter, 17 App. Div., 329, (N. Y.)

POINT II,

THE BOUGHT NOTICE DID NOT AUTHORIZE THE REPLEDGING OF STOCK PLEDGED AS COLLATERAL

Berry & Co., after executing an order to purchase or sell stocks, delivered to the customer a "Bought Notice" (Ex. C. R. Pg. 89), which it is claimed gave Berry & Co. the right to hypothecate Hall's certificate. This contention is hardly tenable, because Hall's contract is evidenced by the receipt (Ex. B. R. Pg. 89), which cannot be subsequently altered or changed to affect Hall's rights

without his consent, and this contract was never changed, altered or modified. It seems clear, therefore, that Be[illegible] & Co. could not later substitute a new agreement so far as it related to the certificate in question whatever its effect may have been upon the stock bought by Berry & Co. and noted in the "Bought Notice". Assuming however, for the purpose of this argument, that the "Bought Notice" was in fact the contract, Berry & Co. thereby acquired no right to repledge Hall's certificate. The material portion of said notice may be conveniently divided into two parts as follows:

1. "It is agreed that Jacob Berry & Co. is appointed as agent to receive and deliver stocks, bonds, securities or commodities *bought or sold for my account* with power to hypothecate, rehypothecate, pledge or repledge or loan *any of said stocks*, bonds or securities, or commodities therefor and to substitute similar certificates, and

2. "The said Jacob Berry & Co. are authorized *upon the approximate exhaustion of margin* without notice to me to *buy or sell as the case may be any stocks*, bonds, securities or commodities *held by them for my account as collateral* for margin or otherwise, provided such purchases or sales are made upon the *Consolidated.....Exchange of New York*", etc.

The first of the said parts relates solely to stocks, etc., *bought or sold* by Berry & Co., and the second to stocks held as *collateral* which distinction was recognized by the Circuit Court of Appeals in its opinion (R. Pg. 98). The "Bought Notice" at the most gave Berry & Co. the right, upon the approximate exhaustion of Hall's margin, to *sell* the certificate of stock in question, and then only at specifically designated places, which does not include the Hanover National Bank. Hall's margin was never exhausted and his stock was never sold.

POINT III.

HALL BY FILING HIS PROOF OF CLAIM DID NOT MAKE AN ELECTION OF REMEDIES OR WAIVE HIS RIGHT TO RECLAIM HIS CERTIFICATE

At the first meeting of creditors, December 19, 1904, Hall filed a proof of claim Exhibit E (R. Pg. 91) which contained the reservation, that

"*Said deponent hereby stipulates that by filing a notice of this claim he does not waive any right of action that he now has to recover possession of said certificates* or the value thereof against either of the bankrupts, or any person in whose possession *they may be found*, or any right of action that he has against either or both of said bankrupts for the conversion of said certificates to their own use when said bankrupts knew that said certificates were not their property and never had been, and that the said deponent does not waive any right whatsoever of any kind, nature or description, against the said bankrupts, or either of them, for or on account of the failure of the bankrupts, or either of them, to return said certificates to said deponent and for the unlawful hypothecation and conversion of the same by the said bankrupts, or either of them."

At said meeting Hall represented a large number of creditors whose powers of attorney he held and which now form part of the files in the bankruptcy court, and, as such attorney, and in obedience to the duty due his clients, participated actively at said meeting, at which the Referee announced (R. Pgs 87-88):

"An informal ballot (would be taken) for the purpose of obtaining an expression of opinion, not to be counted for the election of Trustee, and that a short adjournment would be taken for the purpose of examination of claims, and that the formal election of Trustee would occur on the 21st day of December."

Hall, relying on this announcement, did vote his claim on this informal ballot.

This vote was not counted in the election for trustee and on a subsequent day at another session, when the formal vote for trustee was taken *Hall did not vote upon his own claim*, (*R. P. 88*). As there is no provision in the bankruptcy law for a Referee holding informal ballots, or other moot proceedings, the effect of the informal ballot in the case at bar is nil and should not be here considered any more than if it had never been taken, even the Referee himself characterized this informal ballot as an "Abortive attempt to elect a trustee" (R. Pg. 28).

Hall, as soon as he knew where his certificates were, brought reclamation proceedings, and has, through an order of Court in this bankruptcy proceeding, received ninety shares of stock which were deposited by him as collateral and some of which certificates are enumerated in the receipt Exhibit B. (R. Pg. 89). The trustees contend, that in filing the proof of claim Hall elected to come in as a general creditor and waived his right to reclaim his stock. The question of election is largely one of intention. It is apparent from Hall's proof of claim that he intended to secure possession of his certificate if possible from "any person in whose possession they (it) may be found," and his subsequent acts, as well as his presence in this court, support this view. Clearly from the use of the words "in whose possession they (certificates) may be found" Hall did not know where his certificates were when his claim was filed, and it is significant that the trustees did not bring to the attention of the Court until March 21, 1905, (R. Pgs. 7-12) three months after their election, that the certificates in question were in their hands. The record discloses nothing to indicate that when Hall filed his claim or attended said meetings, he had any knowledge as to the location of his certificates, who had them, or that they were even in existence. Hall did not vote his claim at the election of a trustee and has made every effort to recover his stock, being successful in reclaiming ninety out of one hundred shares, which he deposited as collateral security, and the Referee in Bankruptcy, the District Court, and the Circuit Court of Appeals have all successively held that he is entitled to the certificate now held by the trustees.

If Hall had made no effort to secure his certificate after obtaining knowledge as to its whereabouts then it might have been deemed an election, and again, if the filing of the proof of claim was an election, perhaps the trustees can enlighten this Court as to why they allowed Hall to have the other ninety shares of stock held as collateral and delivered by them to him after the filing of said proof of claim. The courts hold that the filing of a proof of claim which substantially states all the facts and contains a notice that the claimant intends to reclaim his stock is no waiver of his right to bring a proper reclamation proceeding.

In Mould *v.* The Importers' and Traders' National Bank, 72, App. Div. 30, (N. Y.) the facts were very similar to those in the case at bar, being an action to recover a certificate deposited with brokers as collateral security for the payment of money advanced for the purchase of other stock, and in turn deposited by the brokers with the defendant bank as collateral security for a loan to themselves. The brokers became insolvent, made a general assignment and subsequently were adjudged bankrupts. The plaintiff, besides bringing his action to reclaim his certificates, filed a proof of claim with the trustee in bankruptcy very similar to the one filed by Hall. Judge McLaughlin, writing the opinion of the Court, said at page 34 :

"Nor does the fact that the plaintiff presented his claim to the trustee in bankruptcy prevent the prosecution of this action to recover the stock or its proceeds (Rhinelander *v.* National City Bank, 36 App. Div. 11). This action was instituted, so far as it appears, prior to the filing of such claim, and *if it were not, it would not, in our opinion, make any difference, because the bringing of the action is sufficient evidence of an election upon the part of the plaintiff to pursue this remedy and recover the stock or its proceeds, instead of relinquishing whatever right he might have in this respect and take in place thereof whatever dividend might be made to him as general creditor in the bankruptcy proceedings.*"

The case of Rhinelander *v.* National City Bank, 36, App. Div. 11, N. Y. referred to in the Mould case, was also an action similar to the case at bar and brought to

recover the proceeds of specific stock. The defendant Ayer had left certain stock with his brokers for safekeeping and by them wrongfully pledged with the defendant bank before making an assignment in bankruptcy. The bank had sold the stock, paid itself in full and had a cash balance. Ayer filed a claim (see Appeal Book, App. Div., First Dept., Vol. 271, N. Y. Bar Association) similar to Hall's proof of claim, prior to joining in the action to reclaim the balance of the proceeds of his stock from the bank, and it was contended, as it is here, that he had thereby made an election of remedies and waived his right to reclaim the proceeds of his stock. The Court held, however, that the mere filing of his claim was no election of remedies and no waiver.

An analysis of LeMarchant *v.* Moore, 150 N. Y., 209, upon which the trustees rely, shows clearly that the Court did not consider the filing of a claim such as Hall's to be an election of remedies and a waiver of his right to reclaim his stock. In that case L. & Co. bought and paid for 200 shares of stock through E. & Co., who in turn purchased the stock through M. & S. 100 shares were delivered. E. & Co. failed and made an assignment. L. & Co. demanded the stock from M. & S., but M. & S. sold it, satisfied their lien, and gave the assignee of E. & Co. the cash balance of $5,324.66, and in addition 1,100 shares of B. A. L. stock. Thereupon L. & Co. filed a claim with the assignee in the following form (see Appeal Book, Court of Appeals, Vol. 45, N. Y. Bar Association):

"I, Gaspard Farrer,.....do swear that said Bliss & Tobey, surviving members of the firm of Evans & Co., insolvent debtors.....at and before the date of such proceedings was and still is justly and truly indebted to our said firm in the sum of $16,802.90, according to the account hereto annexed, marked 'A,' for which sum or any part thereof our said firm has not, nor has any other person to our said firm's use to my knowledge or belief received any security or satisfaction whatever beyond what has been disposed of agreeably to law."

The account marked "A" shows that the $16,802.90 represented the full amount due L. & Co. from E. & Co.,

including the proceeds of the sale of the 100 shares of stock by M. & S. On its face the claim is an absolute one for the full amount due L. & Co., and the only hint of a reservation is the following endorsement on the back: "The within claim is offered for proof for the sum of $11,047.12. Gaston & Snow, Attorneys for L. & Co." Notwithstanding this apparently absolute claim it was held that L. & Co. could recover from M. & S. the difference between the said sums of $16,802.90 and $11,047.12. In brief, the endorsement was a sufficient reservation and no rights against M. & S. had been waived for the difference, but only to their right to have the proceeds from the sale of said B. A. L. stock applied to their claim, because they had said nothing about that in their proof of claim. How much stronger is Hall's case, where the reservation is set out distinctly, clearly and unequivocally. The case of LeMarchant *v.* Moore, instead of being an authority against our position is of the strongest kind in favor of the contention that Hall did not make an election nor waive his right to recover his stock.

The cases cited by the trustees in their brief on the general points of election of remedies are clearly not in point, and comment upon them is deemed unnecessary.

Hall never intended to give up his right to reclaim his stock and did nothing that could be so construed and the foregoing cases clearly hold that upon similar facts what Hall actually did was neither an election nor a waiver.

POINT IV.

THE TRUSTEES CANNOT NOW TRANSFER SAID CERTIFICATE

It is contended on behalf of Hall that the trustees under the power of attorney have no authority to transfer said certificate of stock at this time so as to give title thereto, because said power of attorney was given to Berry & Co. and was not exercised by them, and cannot now be enlarged to include the trustees, especially as

they have no claim against Hall to which the proceeds of the sale of said certificate may be applied.

There are other points involved in the case at bar which are common to all of the respondents, and to avoid duplication of briefs, have not been touched upon herein, but have been discussed at length in the briefs filed upon behalf of the other respondents. By permission of the learned counsel who have prepared these briefs, I most respectfully refer your honors thereto for discussion of such points, as well as to my brief [pages 2, 3, 4 and 5], filed in this Court in reply to the petitioners' motion for a writ of certiorari, for a discussion of the point that there is no conflict between the decisions of the Circuit Court of Appeals of the Second Circuit in the case at bar and the Circuit Court of Appeals for the First Circuit *in re* Swift, *et al*, 112 Federal Reporter, 315.

The decree of the Circuit Court of Appeals for the Second Circuit should be affirmed with costs, so far as it relates to the claim of George E. Hall.

Respectfully submitted,

GEORGE E. HALL,

Respondent.